overruled.[17] However, it has been held that a sale of intoxicating liquors in another State by one citizen of Massachusetts to another with knowledge or reasonable cause to believe that they were to be resold by the purchaser in Massachusetts against law and with a view to such resale will not support an action for the price in Massachusetts.[17] It was likewise held where the purpose of the sale was to violate the laws of Maine.[18]

In New Jersey contracts which are in violation of the New Jersey statute against gaming will not be enforced, although valid in the State where made.[19] For an interesting discussion of the principles of this view of the law see the cases cited and also the opinion of Magie, J., in *Flagg* v. *Baldwin*.[20] Some American jurisdictions are in accord.[21]

The law in Pennsylvania seems to favor the English view as laid down in *Saxby* v. *Fulton*, but the decisions on the subject are not very satisfactory upon this point.[22]

Damages for Delayed Telegram as Affected by Conflict of Law.

The recent case of *Western Union Telegraph Company* v. *Hill*[1] raises an interesting point on which the cases are in absolute conflict. A telegram was sent from Georgia to Alabama. Through the negligence of the telegraph company, the delivery was delayed, and the sendee brought action in Alabama for breach of contract, and claimed to recover damages for mental anguish caused by the negligence. The law of Alabama allows such damages, but that of Georgia does not. It was held that the law of Alabama governed the case.

Where a contract is made and performed in the same State, it is well settled that matters relating to its execution, validity, or interpretation are determined by the law of that State. In

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[17] *Webster* v. *Munger* (*ante*).

[18] *Graves* v. *Johnson*, 156 Mass. 214 (1892).

[19] *Minzesheimer* v. *Doolittle*, 60 N. J. Eq. 394 (1899).

[20] 11 Stew. (38 N. J. Eq.), 219 (1884).

[21] See cases cited in 20 Cyc. 924, n. 49; 24 Cent. Dig. cols. 1532-4.

[22] *Scott* v. *Duffy*, 14 Pa. 18 (1849).

[1] 50 Southern, 248 (Ala.).

some jurisdictions this principle has been deemed sufficient to justify a decision contra to the principal case on similar facts.[2] But the contract in the principal case was not wholly performed in the State in which it was made. Where a contract is made in one State and performed in another, the rule is that the intention of the parties to the contract determines the law applicable. To determine such intention, the subsidiary *prima facie* rule has been adopted that the law of the place of performance governs. But the contract in the principal case may be considered as partly performed in each State. Where a contract is partly performed in the State in which it is made, the weight of authority favors the view that the *lex loci contractus* governs, notwithstanding the part performance in another State.[3] But some jurisdictions have considered that the delivery of the telegram is the performance contemplated by the parties, and therefore have held that the law of the place to which the telegram is sent governs the contract.[4] This would seem to be the better view, if it is really a question of intention.

The conclusion in the principal case was reached on an entirely different ground. The general rule in tort cases is that the *lex loci delicti* governs the right of action, and the Court, considering that the duty of a telegraph company to transmit a telegram in due time is a public duty, held that the negligence was as much a tort as a breach of contract, and, since the breach occurred in Alabama, the law of that State was applied. This ground seems very unsatisfactory, because the action was on the contract, and by the laws applicable to contracts, the place where the breach occurred is immaterial.[5]

In Indiana, the penalty allowed by statute for the negligence of a telegraph company cannot be recovered unless the telegram was sent from Indiana,[6] while in Tennessee, under a somewhat

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[2] *Western Union Telegraph Co.* v. *Waller*, 74 S. W. 751 (Tex.); *Western Union Telegraph Co.* v. *Woodard*, 84 Ark. 323; *Bryan* v. *Western Union Telegraph Co.* 133 N. C. 603.

[3] *Reed* v. *Western Union Telegraph Co.*, 135 Mo. 661; *Bartlett* v. *Collins*, 109 Wis. 477; *Hudson* v. *N. Pac. Ry. Co.*, 92 Iowa, 231.

[4] *Western Union Tel. Co.* v. *Eubanks*, 100 Ky. 591; *North Packing Co.* v. *Western Union Tel. Co.*, 70 Ill. App. 275; *Western Union Tel. Co.* v. *Blake*, 29 Tex. Civ. App. 224 (this case is probably overruled by later Texas cases, however).

[5] *Western Union Tel. Co.* v. *Waller*, 74 S. W. 751; *Bryan* v. *Western Union Tel. Co.*, 133 N. C. 603; *Western Union Tel. Co.* v. *Blake*, 29 Tex. Civ. App. 224.

[6] *Western Union Tel. Co.* v. *Hamilton*, 50 Ind. 181; *Carnahan* v. *Western Union Tel. Co.*, 89 Ind. 526; *Western Union Tel. Co.* v. *Reed*, 96 Ind. 195.

similar statute, recovery is allowed if the action is brought in Tennessee, regardless of the *locus contractus.*[7]

The relation of the *lex fori* to the measure of damages under such circumstances is not discussed in the majority of the cases, and yet this would seem to be the first point to be determined. It is settled law that the *lex fori* determines all matters relating to the remedy. Does, then, the measure of damages recoverable for the breach of a contract pertain to the remedy merely, or is it an element of the substantive rights of the litigants? Upon this point there is much confusion.

In Texas it has been held that the measure of damages pertains to the right and not to the remedy,[8] and this view is favored by Wharton,[9] but opposed by Minor.[10] The majority of the cases *ex contractu* are silent upon the subject. Where the law of the forum is applied, it is because the forum is also the place of performance or the *locus contractus;* and where it is not applied, it is usually without mention of its relation to the case.

In actions of tort the decisions are in conflict. The weight of authority is perhaps in favor of the view that the measure of damages is an element of the substantive rights of the parties and therefore determined by the *lex loci delicti,*[11] but there is considerable authority to the contrary.[12]

Where interest is allowed, not under contract, but by way of damages, the rule seems to be that the rate must be according to the *lex fori.*[13] On the other hand, the measure of damages recoverable from an indorser for the protest of a promissory note or bill of exchange is determined by the law of the place where the contract of indorsement was made.[14] But in such case there seems a valid distinction. The indorsers of a bill of exchange contract to guarantee its acceptance and payment at the proper place, and, in default of such payment, they

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[7] *Gray* v. *Western Union Tel. Co.*, 108 Tenn. 39.

[8] *Thomas* v. *Western Union Tel. Co.*, 25 Tex. Civ. App. 398.

[9] Wharton, Conflict of Laws, § 471f, note 2.

[10] Minor, Conflict of Laws, § 208.

[11] *Louisville Co.* v. *Whitlow*, 19 Ky. Law Rep. 1931; *Hyde* v. *Wabash etc., Ry. Co.*, 61 Iowa, 441.

[12] *Evey* v. *R. R. Co.*, 56 U. S. App. 118, 81 Fed. 294; *Higgins* v. *R. R.*, 155 Mass. 176; *Wooden* v. *R. R.*, 126 N. Y. 10.

[13] *Clark* v. *Child*, 136 Mass. 344; *Goddard* v. *Foster*, 17 Wall. 123; *Carson* v. *Smith*, 133 Mo. 606.

[14] *Green* v. *Bond*, 37 Tenn. 328; *Allen* v. *Union Bank*, 5 Wharton (Pa.), 420; *Peck v. Mayo*, 14 Vt. 33. See also *Roe* v. *Jerome*, 18 Conn. 138.

agree, upon due protest and notice, to reimburse the holder of the note in principal and interest at the place where they entered into the contract. The damages are therefore a part of the contract itself, and the *lex loci contractus* is rightly applied.

Upon the whole, it is submitted that the better view is that the measure of damages is a matter of remedy merely. It has nothing to do with the right of action, or its inherent elements or character, and the wrong should be redressed in accordance with the public policy of the forum.

LEGISLATIVE ENACTMENT LIMITING THE USE OF DEMISED PREMISES AS AFFECTING A TENANT'S LIABILITY TO PAY RENT.

A very nice legal question is often raised in determining just what acts amount to such a deprivation of the use of premises by a tenant as to terminate the lease and work a suspension of the rent. A new phase of this question has been raised by the passing of prohibition laws in several of the Southern States, as is illustrated by the recent Alabama case of *O'Byrne* v. *Henley*, 50 Southern, 83 (1909). There premises were let "for saloon purposes," and some time before the term of the lease was expired the prohibition law in question was passed, whereupon the tenant claimed he was absolved from the payment of further rent, the premises being rendered unfit for the purposes for which they were let. But the Court decided the lease was not terminated so as to excuse the tenant, reasoning as follows: By Common Law, where leased premises are destroyed by fire, inevitable accident, etc., the tenant is not relieved from an express covenant to pay rent[1] unless the property is wholly destroyed, when the tenant is relieved from the payment of rent. An example of such total destruction is where apartments have been leased in a building which was destroyed by fire; the enjoyment of the space demised in air has thus become impracticable.[2] With this as a basis the Court goes on to argue that the destruction of business which by the lease was to be carried on in the demised premises is, as to the liability of the tenant to pay rent, analogous to the destruction of premises, and where the business is *wholly* destroyed the liability to pay rent ceases, although under the facts in

[1] *Cook* v. *Anderson*, 85 Ala. 99, 4 South, 713; Taylor on Landlord and Tenant, § 377.

[2] *Shawmut* v. *National Bank*, 118 Mass. 125; *Ainsworth* v. *Pitt*, 38 Cal. 89.